

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

# CHARLES F. SMITH, DECEASED

Claimant

VS.

**DESIGNER CONSTRUCTION, INC.**

Respondent

AND

## KANSAS BUILDING INDUSTRY WORKERS

## COMPENSATION FUND/EMPLOYERS

**MUTUAL CASUALTY COMPANY**

Insurance Carrier

Docket No. 1,013,029

## ORDER

Decedent's widow, Jovita Smith (hereinafter "claimant"), on behalf of her deceased husband, Charles F. Smith (hereinafter "decedent"), appeals the Award of Administrative Law Judge Bryce D. Benedict dated March 31, 2004.

Claimant was denied benefits after the Administrative Law Judge (ALJ) determined that decedent's death on August 18, 2003, did not arise out of and in the course of his employment with respondent. The Appeals Board (Board) heard oral argument on October 12, 2004.

## APPEARANCES

Claimant appeared by her attorney, Judy A. Pope of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Roy T. Artman of Topeka, Kansas.

## RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

**ISSUES**

- (1) Did decedent's accidental injury, which resulted in his death, arise out of and in the course of his employment with respondent? More particularly, did decedent's heart attack result from unusual exertion performed at the job on the date of death or is it the result of an external force (heat) sufficient to constitute an accidental injury arising out of and in the course of his employment?
- (2) Can the records from the Department of Veterans Affairs be included as part of the record?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

Decedent, a working supervisor for respondent for many years, was 58 years old on August 18, 2003, when he collapsed at approximately 11:00 a.m. He had been working at a site in Manhattan, Kansas, helping to replace a curb, before the accident.

Evidence in the record indicates that decedent and the other workers arrived outside at the job site at about 7:30 or 8:00 in the morning. The parties acknowledge that at the time of decedent's heart attack, approximately 11:00 a.m., the outside temperature was between 100.4 and 102.2 degrees Fahrenheit. Additionally, the evidence indicates that the humidity at that time of day was approximately 33 percent, with a breeze of 11 to 20 miles an hour.

The evidence is somewhat contradictory regarding the extent to which decedent was a working supervisor or merely a supervisor. Rick Reinerio, decedent's stepson, also worked for respondent, although he was not working at that particular location on that date. He testified that decedent supervised, but only rarely helped with the physical labor. He also testified that on the date of death, the weather was extremely hot and humid. He stated those were not normal conditions weather-wise. He also testified he was unaware of his stepfather having ever had treatment for a heart problem prior to the date of death.

Larry James Bonds, a laborer for respondent, testified that while it was not normal for decedent to do the physical labor, if there was a need, decedent would pitch in and help with the physical work. On the date of the death, the concrete was delivered at approximately 9:00 a.m. Decedent was using a wooden float, building the curb. The float was described as a hand tool used to smooth out the curb. The actual hauling and shoveling of the concrete was done by other laborers.

The first of the concrete trucks ran empty, so they then were allowed a 15- to 25-minute break before the next truck arrived. Mr. Bonds testified that while the temperature was pretty warm, it was not causing him (Mr. Bonds) any problems.

When the second truck arrived, they again began building the curb. Mr. Bonds stated that decedent complained of having gas prior to the coronary event. Mr. Bonds testified that decedent was right next to him working, but when he looked back up, he saw decedent lying on the ground. An ambulance was called, and decedent was transported to Mercy Health Center in Manhattan, Kansas, where he died.

Russell Smith, decedent's younger brother, also testified. Mr. Smith had worked as a laborer for several years, working with decedent for approximately five years. He testified that they worked side by side, so he was familiar with decedent's job duties. Both decedent and Larry Dixon, the lead foreman, were at that site on that date. Mr. Smith testified decedent was to oversee the job. He acknowledged that while most of the time decedent did not do the physical work, he did participate when they were short-handed. He testified the temperature that day was warm, but they had worked under more severe conditions in the past. After the first truck ran out of concrete, they took a break and decedent walked across the street to a convenience store and brought back drinks for everyone. That was at approximately 10:45 in the morning. The next truck arrived, and they began building the second curb when decedent collapsed. He described the job being performed by decedent as a "pretty easy" job. While it did take some physical effort, it was not strenuous or heavy work.

Also to testify was Larry Dixon, the lead foreman for respondent. He was asked whether his supervisory job was more supervisory in nature or that of a laborer. He responded that it is approximately 50 percent either way. He and decedent had worked on a number of jobs together over a period of several years, all involving concrete work. On the date of accident, they were forming a six-by-six curb (six inches wide, six inches tall), approximately 60 feet in length. Apparently decedent had already formed the curb the day before, putting up the wooden stakes and forms necessary to hold the concrete in place. The concrete arrived at approximately 9:00 a.m., and they started shoveling the concrete out of the truck, which work was performed by other laborers. Decedent did not participate in either the "wheelbarrowing" or shoveling activities. Decedent did some of the knocking down, which requires a finishing tool to smooth the concrete out, and some of the edging, which also requires the use of a hand tool. Mr. Dixon did not believe the temperature that day was any different than the prior days they had been working on the job, although he acknowledged it was warm. He personally was not having any difficulty with the temperature.

Testimony indicated that the work being performed was done in the shade. However, when decedent collapsed, he was lying on the ground in the sun. Mr. Dixon

acknowledged that decedent was a cigarette smoker, but had no idea how often or how much decedent smoked.

Decedent was transported to Mercy Health Center where he was declared dead. His body was not examined by the local pathologist/coroner, nor was an autopsy performed. A medical deposition was taken of John F. Bambara, M.D., a pathologist with a subspecialty in medicine. He is the district coroner for Riley and Clay Counties. He was asked to review the death of decedent, although he did not personally review any medical records or examine the body. His only information was obtained by telephone conference with a Dr. Hamel, who is an emergency room staff doctor at Mercy Health Center. Dr. Bambara also spoke on the phone to an unidentified nurse in the emergency room. Dr. Bambara was provided no additional medical information. Dr. Hamel advised Dr. Bambara that decedent's body temperature was 101 degrees at the emergency room, with the temperature being taken rectally. He was also told that decedent had a history of heart attack or other cardiac problems, which information Dr. Hamel indicated came from one of decedent's relatives in the emergency room.

Dr. Bambara testified that an outside temperature, which was identified as being 100 degrees or higher, was the kind of temperature which puts stress on the body and would put additional stress upon the heart. He testified on direct examination that he thinks it was a contributing factor. The death certificate dated August 21, 2003, created by Dr. Bambara in association with this accident, noted that decedent died of complications from a myocardial infarction and indicated that decedent suffered from ASHD (atherosclerotic heart disease) for several years and that a contributing factor was the high ambient temperature over 95 degrees Fahrenheit. Dr. Bambara testified that while it is difficult to say why decedent suffered the heart attack, a person can have a heart attack for no particular reason, but that he was satisfied that the heat itself did contribute as an indirect cause of additional strain on decedent's heart. He testified at one point in his deposition that the heat that day was a contributing factor and at another time during his deposition that it was a significant contributing factor.

Karl D. Pfuetze, M.D., a board certified cardiologist and internal medicine specialist, also testified in this matter. Dr. Pfuetze was provided multiple medical reports on decedent going back to pre-1998. The records included Department of Veterans Affairs records going back to 1998 and before.

Dr. Pfuetze also reviewed the transcripts of the deposition testimony of Dr. Bambara, Larry Dixon, Larry James Bonds and Russell Smith. Dr. Pfuetze stated that according to the VA records he had reviewed, decedent had been diagnosed with ASHD as early as 1998. Strangely, neither decedent's wife, Jovita Smith (who testified in this matter), nor his stepson, Rick Reinerio, nor his stepdaughter-in-law, Judy Reinerio, were aware of decedent having any prior heart problems.

Dr. Pfuetze also discussed the fact that decedent was a smoker, consuming two to three packs of Pall Mall cigarettes per day over a period of years. He testified that in general, a male who smokes two to three packs of cigarettes a day can expect to die in his late 50s or early 60s. He also identified multiple risks associated with decedent, which basically made him a heart attack waiting to happen. He testified that the cause of death was not known because there was not enough information obtained either at the point of collapse or even in the emergency room to determine the likely cause of death. He did list several possibilities, including a major coronary artery obstruction, a massive tear of an aorta, a dissection, a massive pulmonary embolus, an underlying disease such as undiagnosed viral infection in the heart, congenital abnormalities in the coronary arteries or a cardiomyopathy. He stated that the cause of death in this case was pure speculation and that Dr. Bambara's opinion was "a total guess." Dr. Pfuetze also testified that the activity that decedent was doing at the time of the heart attack would not be considered strenuous and there was no correlation between those physical activities and the death.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup>

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony which may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.<sup>2</sup>

The ALJ in the Award found first that decedent's death was not caused by unusual exertion on the job nor by any outside external forces. The ALJ, in effect, adopted the opinion of Dr. Pfuetze as more persuasive than that of Dr. Bambara. The Board agrees.

K.S.A. 44-501(e) states:

Compensation shall not be paid in the case of coronary or coronary artery disease or cerebrovascular injury unless it is shown that the exertion of the work necessary to precipitate the disability was more than the employee's usual work in the course of the employee's regular employment.<sup>3</sup>

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<sup>1</sup> K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

<sup>2</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

<sup>3</sup> K.S.A. 44-501(e).

The Kansas Supreme Court, in *Makalous*,<sup>4</sup> addressed the language contained in K.S.A. 44-501 dealing with the “usual vs. unusual” dispute created by the so-called “heart amendment” to K.S.A. 44-501, stating:

What is usual exertion, usual work, and regular employment as those terms are used in the 1967 amendment to K.S.A. (now 1972 Supp.) 44-501 will generally depend on a number of surrounding facts and circumstances, among which the daily activities of the workman may be one, but only one, among many factors.

Whether the exertion of the work necessary to precipitate a disability was more than the workman's usual work in the course of his regular employment presents a question of fact to be determined by the trial court.<sup>5</sup>

In this instance, the ALJ found, and the Board agrees, that decedent's myocardial infarction was not caused by unusual exertion within the meaning of K.S.A. 44-501(e). While it is contended that decedent's labors on August 18, 2003, exceeded his normally performed job duties, the record on this point is in significant conflict. First, there is the indication from Mr. Dixon that both he and decedent were working supervisors, working approximately 50 percent of the time as supervisors and 50 percent of the time performing physical labor. There is also the testimony of decedent's younger brother, Russell Smith, that decedent was performing a “pretty easy” job at the time of the heart attack. The labors described were those same labors which decedent had regularly performed on his job. The Board finds that the exertion required in performing that job was no more than decedent's usual work in the course of his regular employment duties.

The Kansas Supreme Court, in *Makalous*, went onto note that where the claimant's disability is the product of some external force or agency, and not of the exertion of the claimant's work, the heart amendment has no applicability.

Where exertion is not the agency which produces the workman's disability, the usual vs. unusual exertion test of the heart amendment is irrelevant.<sup>6</sup>

In *Dial*, the Supreme Court found that when an external force other than exertion is the factor which precipitates a cerebrovascular accident, this could result in the disability becoming compensable as a result of that “external force.”

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<sup>4</sup> *Makalous v. Kansas State Highway Commission*, 222 Kan. 477, 565 P.2d 254 (1977).

<sup>5</sup> *Makalous*, at 481; citing *Nichols v. State Highway Commission*, 211 Kan. 919, Sly. 3 and 4, 508 P.2d 856 (1973).

<sup>6</sup> *Makalous*, at 482; citing *Dial v. C. V. Dome Co.*, 213 Kan. 262, syl. ¶ 4, 515 P.2d 1046 (1973).

In *Dial*, the medical testimony verified that it was the heat that the claimant was subjected to which led to the disability. There was no mention in the medical evidence of exertion as a causative factor. The court, in *Dial*, found that the evidence indicated the progressive enclosure of the mezzanine on which the claimant worked caused "progressively greater heat." The court went on to find that the cardiovascular injury in *Dial* did not bring the heart amendment into play because the agency which "precipitated" the disability was not the exertion of his work, but rather the external force, in that instance the extreme heat. The court, in *Dial*, stated:

Where the disability is the product of some external force or agency, and not of the exertion of the claimant's work, the heart amendment has no applicability. In such a case, where exertion is not the agency "necessary to precipitate the disability," the usual vs. unusual exertion test applied in our previous heart amendment cases is irrelevant. Instead, the customary standards are to be applied in determining whether the injury was accidental, and whether it arose out of and in the course of a workman's employment.<sup>7</sup>

The court, in *Makalous*, after analogizing *Dial*, found that heat and cold in working environments are recognized as external forces which can cause injury. In *Makalous*, it was the extreme cold which subjected the claimant to conditions which precipitated his heart attack.

In this instance, the testimony is in conflict whether the weather conditions were extreme enough to cause the heart attack suffered. The parties stipulated that the temperature at the site was 100 degrees or higher. However, the humidity was low, with a breeze between 11 and 20 miles an hour. Certain coworkers and the foreman, Mr. Dixon, stated that the temperatures were not anything more significant than they were used to and that while the temperature was warm, it was not unusually uncomfortable.

Additionally, the testimony of Dr. Pfuetze is persuasive that the heat on that date was not a significant contributing factor as an external force leading to the accident. He, instead, focused on decedent's lengthy cigarette smoking history and his prior history of ASHD as being the more significant factors leading to this death.

The Board finds that claimant has failed to prove that the accidental injury suffered on August 18, 2003, in the form of a myocardial infarction arose out of and in the course of decedent's employment.

Claimant's attorney argued that Dr. Pfuetze's opinion should be rejected as he inappropriately utilized medical records from the Department of Veterans Affairs in forming

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<sup>7</sup> *Dia1*, *supra*, at 268.

his opinion regarding the cause of this death. However, it is noted that, while Dr. Pfuetze reviewed those records, the medical records from the Department of Veterans Affairs were not placed into evidence. The Board need not decide whether to do so would have been in violation of K.S.A. 44-519, which prohibits the report of an examining health care provider from being placed into evidence absent a stipulation, unless the testimony of that health care provider is taken in support of those records. In this instance, the medical records were not placed into evidence, but were, however, reviewed by Dr. Pfuetze in reaching his opinion. The Kansas Court of Appeals, in *Roberts*,<sup>8</sup> stated:

Medical reports or any other records or statements shall be considered by the administrative law judge at the preliminary hearing. However, the reports shall not be considered as evidence when the administrative law judge makes a final award in the case, unless all parties stipulate to the reports, records or statements or unless the report, record or statement is later supported by the testimony of the physician, surgeon or other person making the report, record or statement.<sup>9</sup>

The Supreme Court, in *Roberts*, went onto state, however:

K.S.A. 44-519 does not limit the information a testifying physician or surgeon may consider in rendering his or her opinion as to the condition of an injured employee.<sup>10</sup>

K.S.A. 44-519 does not prevent a testifying physician from considering medical evidence generated by other absent physicians as long as the testifying physician is expressing his or her own opinion rather than the opinion of the absent physician.<sup>11</sup>

The Board finds that Dr. Pfuetze's opinion may be appropriately considered, as he properly utilized the medical reports of other doctors in rendering his own opinion.

The Board finds based upon the above reasoning, that the Award of the Administrative Law Judge denying benefits in this matter should be affirmed.

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<sup>8</sup> *Roberts v. J. C. Penney Co.*, 263 Kan. 270, 949 P.2d 613 (1997).

<sup>9</sup> *Roberts*, at 275.

<sup>10</sup> *Roberts, supra*, at 275; citing *Boeing Military Airplane Co. v. Enloe*, 13 Kan. App. 128, Syl. ¶ 2, 764 P.2d 462 (1988), rev. denied 244 Kan. 736 (1989).

<sup>11</sup> *Boeing*, Syl. ¶ 3; *Roberts, supra*, at 275.



**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated March 31, 2004, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c:     Judy A. Pope, Attorney for Claimant  
       Roy T. Artman, Attorney for Respondent and its Insurance Carrier  
       Bryce D. Benedict, Administrative Law Judge  
       Paula S. Greathouse, Workers Compensation Director